IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 538

MONTGOMERY WARD & CO., INCORPORATED,
Petitioner,

v.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Montgomery Ward & Co., Incorporated, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on July 19, 1944, reversing an order of the District Court of the United States for the District of Columbia dated June 21, 1944.

STATEMENT OF THE MATTER INVOLVED.

On October 20, 1943, the National War Labor Board, acting (R. 67) under Section 7 of the War Labor Disputes Act of June 25, 1943 (57 St. 166; 50 U. S. C. A., App., Sec. 1507, hereafter referred to as "the Act"), issued an order against the Petitioner (R. 67-70), prescribing terms and conditions to govern the relations between Petitioner and a labor union representing certain of its employees in six retail stores operated by Petitioner (R. 3, 7).

On October 5, 1943, Petitioner filed its complaint (R. 1-18) against the members of the National War Labor Board and against Fred M. Vinson, Economic Stabilization Director, and on June 15, 1944, filed a supplemental complaint (R. 97-98). Petitioner charged that the Board had acted in excess of its statutory jurisdiction (R. 9), had denied Petitioner a fair hearing and due process of law as required by the Act and by the Fifth Amendment to the Constitution, (R. 9-10), and had violated the restrictions and standards imposed by the Act (R. 10-13).

Petitioner further alleged:

1. that the Respondents had threatened to enforce the challenged order or cause it to be enforced (R. 13);
2. that the Respondent members of the War Labor Board either had reported or were about to report Petitioner's non-compliance to Respondent Vinson (R. 14);
3. that Respondent Vinson, under the terms of Executive Order No. 9370, was required to, and would, unless restrained, impose sanctions upon Petitioner to enforce compliance with the challenged order;

4. that the Respondents, acting in concert, had caused the forcible seizure of property of Petitioner for the purpose of enforcing another Board order and were threatening and would cause, unless enjoined, the forcible seizure of Petitioner's property to compel compliance with the challenged order (R. 97-98); and

5. that irreparable injury (described with particularity) would result from enforced acceptance of the challenged order (R. 8-9), or from the imposition of sanctions by Vinson (R. 15-16), or from seizure of Petitioner's property and business (R. 98).

Petitioner prayed for an injunction restraining the taking of action intended to compel compliance with the challenged order.

Petitioner also alleged:

1. that the Respondents were claiming the challenged order "is legal and valid" (R. 13);

2. that the Respondent members of the Board were claiming "that the orders of the Board including the order in the present case are enforceable, and that such orders may be enforced by the seizure of • • • property" (R. 97);

3. that the President of the United States had written Respondent Davis in conjunction with the promulgation of Executive Order 9370 (R. 14), asserting that "enforcement of these orders" had been left "to executive action", that "when an employer refuses to comply, his plant may be seized", and that by Executive order 9370 he was "requesting [Respondent Vinson] to direct the application of any and all available sanctions • • • in cases of noncompliance" (R. 79).

Plaintiff prayed for a declaratory judgment under Title 28, U. S. C., Sec. 400 (Judicial Code Sec. 274 (d)) (R. 2), adjudging the challenged order "illegal, void, and of no effect", declaring the Respondents to be without authority to impose sanctions for non-compliance, and, generally, adjudging and declaring the rights of the parties to the controversy (R. 17).

On January 21, 1944, Respondents moved to dismiss and for summary judgment (R. 84-85), submitting affidavits by Respondents Vinson (R. 86) and Garrison, (R. 87), which asserted:

1. that Petitioner's non-compliance had not yet been reported to Vinson (R. 86, 87);
2. that Vinson had neither acted nor "threatened to take action to effectuate compliance", nor had decided what action, if any, he would take (R. 86);
3. that the Respondent members of the Board had neither acted nor "threatened to take action to enforce such directive order" (R. 87);

   and
4. that the Board had "no power to enforce such directive order" (R. 87).

Counter-affidavits filed by Petitioner set forth:

1. that Respondent Garrison had publicly stated that Board members had been, while the instant litigation was pending, "hesitant * * * to attempt to refer the cases to the President, or anything of that sort" (R. 89);
2. that Respondent Davis had publicly stated that the Board members had "interpreted Section 3 [of the Act, providing for seizure of property] to be broad

enough to cover every order that we are directed by the Act to make which is not complied with" since any other view would "leave orders of the War Labor Board without any statutory means of enforcement" (R. 128-129);

3. that Respondent Davis had publicly stated, speaking of Board orders, that the Board members "have assumed that they were all enforceable" (R. 130);

4. that the Attorney General of the United States had publicly stated that "the President is the man who enforces the order" of the Board (R. 133).

Respondents' motions were denied by the District Court on March 20, 1944 (R. 89-90). This order was reaffirmed on June 15, 1944 (R. 122-123).

On June 19, 1944, the Court of Appeals allowed a special appeal and, on July 19, 1944, reversed the decision below. The opinion of the Court of Appeals (R. 135-139) held that Board orders under the Act are neither enforceable nor reviewable (R. 137), do not create legal rights (R. 138, footnote 6), and are "at most advisory" (R. 136, footnote 1). The opinion further held that the complaint, not stating "the form, substance, time, place, or circumstances of any threat", did not state a case "within the Court's general equitable jurisdiction to review and restrain administrative action" (R. 138), and that on this point the affidavits showed an absence of any genuine issue of material fact (R. 139) and required the granting of a summary judgment.

The opinion nowhere stated reasons for the implied holding that the complaint did not set forth a claim for declaratory as distinct from injunctive relief.

JURISDICTIONAL STATEMENT.

a. Statutory provision believed to sustain jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stats. 938 (28 U. S. C., Sec. 347(a)).

b. Statute involved.

The case involves the interpretation and application of the War Labor Disputes Act of June 25, 1943, 57 Stats., Chapter 144, Secs. 163-168 (28 U. S. C. A., App., Secs. 1501-1511), and of the Fifth Amendment to the Constitution of the United States. Sections 3 and 7 of the War Labor Act are reprinted in the Appendix to our Petition.

c. Date of the judgment to be reviewed.

The judgment of the Court of Appeals reversing the order of the District Court was entered July 19, 1944. This Petition for Writ of Certiorari and supporting transcript of record are filed in this Court within three months from July 19, 1944, on October 2, 1944

QUESTIONS PRESENTED.

1. Are orders of the National War Labor Board, issued by virtue of the powers vested in the Board by Section 7 of the War Labor Disputes Act, unenforceable and merely advisory, or do such orders establish rights, fix liabilities, and legally "govern the relations of the parties"?

2. Is a court of equity without power to restrain an administrative body from actions in excess of its jurisdiction, or in violation of the statutory provisions describing its functions, simply because its orders are not enforceable?

3. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, does a complaint which alleges that action which would cause irreparable injury is "threatened" or "is about to, and will" take place, fail to state a cause of action for injunctive relief because "the complaint does not state the form, substance, time, place, or circumstances of any threat"?

4. In the face of allegations in a complaint for injunctive relief, that action causing irreparable injury is "threatened" or "is about to, and will" take place, are affidavits by two of the moving parties simply stating that they have "neither threatened to take action nor taken action" sufficient to support a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure?

5. Does a complaint which alleges the issuance of a specific administrative order presenting terms and conditions to be observed by the plaintiff and which alleges the assertion of antagonistic claims by the defendants and the plaintiff as to the validity and enforceability of this order, fail to state a claim for a declaratory judgment under Title 28, U. S. C., Sec. 400 (Judicial Code, Sec. 274 (d)), and under Rule 57 of the Federal Rules of Civil Procedure?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. In holding that orders of the National War Labor Board, issued under Section 7 of the War Labor Disputes Act, are unenforceable and merely advisory, the Court of Appeals has decided an important question relating to the construction of a statute of the United

States which is of vital importance to thousands of employers and labor organizations affected by such orders, but which has not been, but should be, settled by this Court.

2. In holding that the National War Labor Board, although empowered to "conduct a public hearing", to subpoena witnesses and written evidence, to "decide the dispute", and to "provide by order" the "terms and conditions governing the relations between the parties" which "shall be in effect until further order", nevertheless does not have the power to issue legally binding orders, the Court of Appeals has decided a federal question in a way probably in conflict with the following decisions of this Court: *Texas and N. O. R. Co.* v. *Brotherhood,* 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515; *Shields* v. *Utah Cent. R. Co.,* 305 U. S. 177; *Stark* v. *Wickard,* 321 U. S. ...., 64 S. Ct. (Adv. Sheets) 559, 88 L. Ed. (Adv. Sheets) 510.

3. In holding that the National War Labor Board cannot be restrained from exceeding its statutory jurisdiction and from violating the statutory provisions describing its functions, the Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court in *Pennsylvania R. Co.* v. *U. S. Railroad Labor Board,* 261 U. S. 72, and *Pennsylvania System Federation No. 90* v. *Pennsylvania Railroad Co.,* 267 U. S. 203.

4. In deciding that Petitioner's complaint does not state a claim for injunctive relief because it "does not state the form, substance, time, place, or circumstances of any threat" of irreparable injury, and because it does

not allege "facts which support" Petitioner's "forecast" that it will be irreparably injured, the Court of Appeals

(1) has decided an important question as to the equity powers of federal courts in a way probably in conflict with the decisions of this Court in *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65, and of the Tenth Circuit Court of Appeals in *Vaughn* v. *John C. Winston Co.,* 83 Fed. (2d) 370; and

(2) has decided a question arising under Rule 8 (a) (2) of the Federal Rules of Civil Procedure in a way probably in conflict with the decisions of the Third Circuit Court of Appeals in *Continental Collieries, Inc.* v. *Shober,* 130 Fed. (2d) 631, and of the Eighth Circuit Court of Appeals in *Leimer* v. *State Mutual Life Assur. Co.,* 108 Fed. (2d) 302, and *Sparks* v. *England,* 113 Fed. (2d) 579.

5. In holding that affidavits in support of a motion for summary judgment executed by two of the moving parties stating that neither they nor the other defendants have "threatened to take action" are sufficient to show that "there was no genuine issue as to any material fact", the Court of Appeals has decided a question of substance relating to the construction and application of Rule 56 of the Federal Rules of Civil Procedure in a way probably in conflict with the decisions of this Court in *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U. S. ...., 64 S. Ct. (Adv. Sheets) 724, of the Third Circuit Court of Appeals in *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 Fed. (2d) 1016, and of the Eighth Circuit Court of Appeals in *Walling* v. *Fairmont Creamery Co.,* 139 Fed. (2d) 318.

6. In holding that the complaint not only failed to state a claim for injunction but also failed to state a claim for a declaratory judgment, despite allegations of antagonistic assertions as to the rights of the parties, the Court of Appeals has decided an important question arising under the Declaratory Judgment Act of 1934 (Tit. 28, U. S. C. Sec. 400, Judicial Code, Sec. 274(d)) in a way probably in conflict with the decision of this Court in *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, and with the decision of the Fifth Circuit Court of Appeals in *Gully* v. *Interstate Natural Gas Co.,* 82 Fed. (2d) 145.

PRAYER.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court a full and complete transcript of the record and of all proceedings before it in the case numbered and entitled on its docket Number 8732, *"National War Labor Board, et al., Appellants* v. *Montgomery Ward & Co., Incorporated, Appellee",* to the end that such cause may be reviewed and determined by this Court as provided by law.

MONTGOMERY WARD & CO.,
INCORPORATED,
Petitioner,

By HENRY F. BUTLER,
STUART S. BALL,
JOHN A. BARR,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

Neither the opinion of the Court of Appeals (R. 135-139) nor the oral opinion of the District Court (R. 121-122) have been as yet reported.

STATEMENT OF THE CASE.

The facts and the history of the proceedings are fully summarized in the Petition for Certiorari, pages 2-6.

SUMMARY OF ARGUMENT.

I.

The decision interprets Section 7 of the War Labor Disputes Act as providing for the issuance of orders which are unenforceable by either judicial or administrative process, and which are "at most advisory". This interpretation is contrary to that given similar statutes by this Court; it is contrary to the administrative practice of the Board both before and after the passage of the Act; it is contrary to the views about the administration of the Act advanced by the President, the Attorney General, and the Chairman of the Board; it is not supported by the legislative history of the Act; and it has been rejected by a Committee of the Congress which enacted the Act.

II.

Even if Congress intended that orders of the National War Labor Board should be unenforceable, the Board was subject to restraint when it exceeded its jurisdiction or functioned in a manner prohibited by the Act under principles announced by this Court.

III.

Even if Congress intended that orders of the National War Labor Board should be unenforceable, Petitioner's complaint sufficiently stated a case for an injunction against imminent illegal administrative action which would result in irreparable injury. The Court of Appeals adopted the outmoded view that evidentiary facts must be pleaded, and further held, contrary to the previous views of this and other Courts, that express threats of illegal action are a prerequisite to equitable jurisdiction.

IV.

The Court of Appeals further erred in holding that conclusory, *ex parte* affidavits by the Respondents themselves, which denied only the commission of past overt acts and the making of express threats of future overt acts, were sufficient to entitle Respondents to a summary judgment against injunctive relief. Such a holding is contrary to the views expressed by this Court and at least two of the Circuit Courts of Appeals.

V.

Even if the Court of Appeals was correct in holding that Petitioner's complaint did not state a case for injunctive relief, the complaint did state a claim for a declaratory judgment either passing upon the validity of the Board's order or holding it to be merely advisory and hence not binding upon Petitioner. Petitioner's complaint and affidavits showed that the parties had made antagonistic assertions as to their legal rights and obligations, and Respondents' affidavits did not deny this fact. The Court of Appeals apparently assumed that declaratory relief was not available to the Petitioner unless a case for injunctive relief was also stated. This view of the law is opposed to that of this Court and of at least one Circuit Court of Appeals.

ARGUMENT.

I.

The Court of Appeals Erred in Holding That Orders of the National War Labor Board, Issued in Exercise of the Powers Conferred By Section 7 of the War Labor Disputes Act, Are Unenforceable By Either Judicial Or Administrative Process.

The primary ground on which the Court of Appeals based its conclusion that Petitioner's suit should be dismissed was that "the War Labor Disputes Act does not make the Board's order enforceable or reviewable" (R. 137-138), and that Board actions are "at most, advisory" (R. 136, footnote 1).

Of course, if Board orders are enforceable by either judicial or administrative process, they immediately affect legal rights. The present action would then lie, since the courts of the United States may pass upon the validity of administrative actions "to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers." *Stark* v. *Wickard*, 321 U. S....., at p....., 64 S. Ct. (Adv. Sheets) 559 at p. 571.

The Court of Appeals erred in holding orders of the War Labor Board to be merely advisory and entirely unenforceable.

Section 7 of the War Labor Disputes Act evidences a clear intent on the part of Congress to make Board orders legally binding. The Board is empowered, in case of a labor dispute threatening the war effort, to "summon both parties to such dispute before it", to "conduct a public hearing", to "issue subpoenas", and "to pro-

vide by order" the "terms and conditions" which shall "govern relations between the parties", and which "shall be in effect until further order of the Board". Statutory provisions even less detailed have been held by the Court to establish a *quasi-judicial* agency empowered to issue binding orders, because: "We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect"; *Shields* v. *Utah Cent. R. Co.*, 305 U. S. 177 at p. 182.

The majority of the Select Committee to Investigate the Seizure of Montgomery Ward & Company's Property (House Report No. 1904, 78th Congress, 2d Session) reached the same conclusion, saying:

> "Unless this legislation is to be held senseless and useless, the inevitable conclusion is that Congress contemplated and intended the orders of the Board to be enforced after passage of the Act in the same manner and by the same authority as had repeatedly been done before the Act was passed." (Report, p. 22)

The legislative history of the Act supports rather than negatives this conclusion. Before the Act was passed, in *Bethlehem Steel Corp. et al.*, July 16, 1942, 1 War Labor Reports 325, the Board asserted that its orders were "not being adopted voluntarily by the parties" but were "being imposed upon them by the Board". And in *Central States Employers Negotiating Committee*, March 25, 1942, 1 War Labor Reports 77, the Board held that its orders superseded the anti-trust laws. The avowed Congressional intent was to put the Board "on a solid rock of law" (Cong. Rec. 89: 5831), and not to limit, but to strengthen, its powers (Cong. Rec. 89: 5780, 5830, 5831, 5832). Congress certainly did not intend to give the Board a lesser authority than it claimed before Congress acted.

The Board has continued to construe its powers as mandatory. In *J. Greenebaum Tanning Co.*, Aug. 28, 1943, 10

War Labor Reports 527, the Board held that its orders "supplant any legislation of the State of Wisconsin", and that "the employer is compelled to abide not of his own volition". In *Aluminum Co. of America*, Nov. 27, 1943, 13 Labor Relations Reports 418, the Board asserted that it "was created with powers of compulsory arbitration". In *U. S. Vanadium Corp.*, Jan. 21, 1941, 13 War Labor Reports 527, the Board asserted that its orders are obeyed "involuntarily in response to a mandate of a United States Government agency". In *Acme Rubber Mfg. Co.*, Case No. 4197-CS-D, August 22, 1944, the Board asserted that employees "are legally and equitably entitled to their full claim" to retroactive wage payments ordered by the Board, and that such a claim would have "a high preference in law" in case of bankruptcy.

The record in the present case shows: (1) that Board members "have assumed" that orders of the Board "were all enforceable" (R. 130); (2) that the President of the United States has asserted that, when an employer "refuses to comply", his plant "may be seized and operated by the government" or "less drastic sanctions" such as those set forth in Executive Order 9370 may be applied (R. 79-80); and (3) that the Attorney General of the United States has asserted of Board orders that "to enforce them the President has the power to seize" (R. 131).

The Court of Appeals relied primarliy on two decisions under the Transportation Act of 1920: *Pennsylvania Rd. System Federation* v. *Pennsylvania Rd. Co.*, 267 U. S. 203, and *Pennsylvania Rd. Co.* v. *U. S. Railroad Labor Board*, 261 U. S. 72. But those decisions turned on the inclusion of provisions in the Transportation Act "which clearly contemplated the moral force of public opinion as

affording the ultimate sanction": *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515 at p. 545.

The latter decision, together with *Texas & N. O. R. Co.* v. *Brotherhood,* 281 U. S. 548, (both dealing with the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C., Secs. 151-164), are more closely parallel to the present case than the earlier decisions under the Transportation Act of 1920, and should have been followed by the Court of Appeals.

II.

Even If the Court of Appeals Was Correct in Holding That Orders of the National War Labor Board Are Unenforceable and Merely Advisory, It Erred in Holding That the Board Could Not Be Restrained From Acting Outside Its Statutory Jurisdiction, Or From Failing to Follow the Procedure Specified in the Act.

In *Pennsylvania R. Co.* v. *U. S. Railroad Labor Board,* 261 U. S. 72, this Court held that the Railroad Labor Board, as then instituted, was merely empowered "to give expression to its view of the moral obligation of each side as members of society" (261 U. S. at p. 84), and that, since the Labor Board's decisions, "not being compulsory, violate no legal or equitable right of the complaining company", it was not for the courts "to express any opinion upon the merits of these principles and decisions." (261 U. S. at p. 85).

However, this Court added that: "The Labor Board must comply with the requirements of the statute", and hence did feel called upon to decide, first, whether the Labor Board's proceedings had been instituted by a proper party (261 U. S. at pp. 81-82) and, second, whether the Board had jurisdiction over the type of dispute

involved (261 U. S. at pp. 82-83). Later, in *Pennsylvania R. System Federation No.* 90 v. *Pennsylvania R. Co.*, 267 U. S. 203, this Court expressly held that:

> "Where the Labor Board exceeds its jurisdiction and violates the provisions describing its functions, it may be subject to restraint at the complaint of any properly interested party." (267 U. S. at pp. 215-216)

Petitioner in the present case attacked not only the merits and substance of the order of the National War Labor Board, but charged in addition that the Board had exceeded its jurisdiction and had, by denying a fair hearing, violated the provisions of the Act describing the manner in which it should function.

In holding that Petitioner stated no claim whatsoever, the Court of Appeals decided the case in a way obviously in conflict with the two decisions of this Court construing the Transportation Act of 1920 on which it chiefly relied.

III.

Even If the Court of Appeals Was Correct in Holding That Orders of the National War Labor Board Are Unenforceable and Merely Advisory, It Erred in Holding That the Complaint Failed to Allege in Sufficient Detail a Sufficiently Imminent Threat of Irreparable Injury to Authorize Injunctive Relief.

The Court of Appeals criticized the complaint on these grounds:

> "A plaintiff cannot confer jurisdiction to review even commonplace administrative action by a mere forecast that he will be irreparably injured if the court does not intervene. He must allege facts which support his forecast. * * * Allegations that the Board is about to report plaintiff's non-compliance and that

> the Director is about to issue directives are not statements of fact at all but mere predictions. * * * The complaint does not state the form, substance, time, place, or circumstances of any threat. * * * We understand the complaint to mean not that all 22 of the defendants, or any of them, have made threats, but that the plaintiff considers the situation threatening. The complaint therefore alleges no facts which indicate more than a possibility of any action by the defendants which might cause injury." (R. 138-139)

The allegations of the complaint to the effect that injurious action "is about to" occur, or is "threatened", are allegations of ultimate fact which do not become less than that by describing them as "mere predictions" or as a "mere forecast". They must be supported by evidence before any injunction will issue, but so must all allegations of a pleading.

The criticisms advanced by the Court of Appeals assume that:

1. assertions of ultimate fact about the imminence of injurious action are not good pleading unless specific facts evidencing the ultimate fact are also alleged; and
2. mere imminence of injurious action, when proven, is not sufficient to support an injunction in the absence of express threats.

Both assumptions are erroneous.

A. The allegations of imminent injurious action in the complaint were good pleading under Rule 8 (a) (2) of the Federal Rules of Civil Procedure.

The requirement of Equity Rule 25 that "facts" be pleaded has been superseded by Rule 8 (a) (2) which

requires merely that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief". As a result, "the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted, and a general indication of the type of litigation involved": *Continental Collieries, Inc.* v. *Shober,* (3d cir.) 130 Fed. (2d) 631 at p. 635. Consequently the rules "do not require that a plaintiff shall plead every fact essential to his right to recover": *Sparks* v. *England,* (8th cir.) 113 Fed. (2) 579, at p. 581.

In view of the ample means now provided for probing into the plaintiff's case before trial, a complaint should not be dismissed except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim": *Leimer* v. *State Mut. Life Assur. Co.,* (8th cir.) 108 Fed. (2) 302 at p. 306.

Under these principles, the complaint in the present case was good against the motion to dismiss if an injunction against illegal administrative action may issue on proof either that such action is "threatened" or simply that it "is about to" occur. These allegations gave fair notice to the Respondents of the nature of the Petitioner's claim, even if every fact which would have to be proven before any injunction issued was not averred.

B. Mere imminence of injurious action is sufficient to permit the issuance of an injunction, even in the absence of express threats.

The Petitioner's right to injunctive relief would not be lost simply because Petitioner was unable to prove an overt act already taken by the Respondents, or an express threat already made. Equity possesses the power to act whenever injurious action may be reasonably predicted

even when the defendant claims that the bill discloses only a "mere apprehension that illegal action may be taken": *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65. Express threats have never been held to be necessary to prove an imminence of injury sufficient to support injunctive relief:

> "If threat of injury may only be found in expressions of the defendant, an illiterate mute would be exempt from injunctive orders. Here, as in conspiracy cases and elsewhere, circumstances are the best and sometimes the only obtainable proof. Vaughan's persistent determination to work his will despite the law is proven by an unbroken course of conduct.***"
>
> *Vaughan* v. *John C. Winston Co.,* (10th cir.), 83 Fed. (2d) 370.

Petitioner was therefore entitled to an opportunity to prove the imminence of injurious action by evidence of the course of conduct of the Board in other disputes, (including its action in bringing about a prior seizure of Petitioner's property) and by such other evidence of the Board's intention as might be available, whether specifically described in the Complaint or not. Petitioner was not required either to plead or prove an express threat any more than Petitioner was required to plead the evidence to support its "forecast" that injurious action was intended or reasonably imminent.

IV.

The Court of Appeals Erred in Holding That, Under Rule 56 of the Federal Rules of Civil Procedure, Conclusory Affidavits By Moving Parties Merely Denying That Injurious Action Has Been Taken Or "Threatened" Are Sufficient to Support a Summary Judgment in an Action for Injunction.

Rule 56 (c) permits a summary judgment only when the pleadings and affidavits show that "there is no gen-

uine issue as to any material fact". Rule 56 (e) requires that affidavits "be made on personal knowledge" and "set forth such facts as would be admissible in evidence".

The two affidavits filed by the Respondents were insufficient to support the motion for summary judgment for two distinct reasons:

1. they did not negative the allegations of the complaint that the Respondents "are about to" act injuriously to the Petitioners; and
2. they stated conclusions rather than evidentiary facts; in other words, they were couched in the language of a pleading rather than in the language of evidence.

The one evidentiary fact stated in the affidavits was that the War Labor Board had not yet reported Petitioner's non-compliance to Vinson. The assertion in the Garrison affidavit that the Board possessed "no power to enforce such directive order" (R. 87) was clearly a conclusion of law, and in no sense stated facts disproving Petitioner's allegations that injurious actions would nevertheless be taken. To assert a lack of legal right to effect an injury is in no sense a disclaimer of an alleged intention to do so.

The assertion by Vinson that he was "not presently advised as to what action, if any, I would take" (R. 86) does not constitute a denial of the alleged probability that he would act.

The assertion in both affidavits that the Respondents had "neither threatened to take action, nor taken action" is a statement of evidentiary fact only as to the absence of consummated action, and is at best a conclusion as to

whether action was "threatened". Furthermore, it apparently denies only the taking of action and the making of express threats, and hence does not deny the allegation that action "is about to be" taken.

The insufficiency of these affidavits is emphasized by the following principles:

first:

> "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."
>
> *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, (3rd cir.) 130 Fed. (2d) 1016 at p. 1018.

second:

> "* * * Supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * Mere conclusions of law or restatements of allegations of the pleadings are not sufficient."
>
> *Walling* v. *Fairmont Creamery Co.*, (8th cir.) 139 Fed. (2d) 318 at p. 322.

third: Ex parte affidavits by an interested party covering matters of opinion, or matters which lie chiefly within the knowledge of the affiant, are not sufficient to require summary judgment even in the absence of counter affidavits:

> "This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth facts which place a very different light upon the picture."
>
> *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, (3d cir.) 130 Fed. (2d) 1016 at p. 1022.

"It may well be that the weight of the evidence would be found in trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony."

Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. ..... at p. ....., 64 S. Ct. (Adv. Sheets) 724 at p. 729 (Quoting *Sonnentheil* v. *Christian Moerlein Co.*, 172 U. S. 401 at p. 408: " * * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.")

V.

Even If the Court of Appeals Was Right in Holding That the Complaint Failed to Allege a Sufficient Imminence of Irreparable Injury to Support Injunctive Relief, the Court of Appeals Erred in Holding That the Complaint Failed to State a Case for a Declaratory Judgment.

The opinion of the Court of Appeals did not separately discuss the Petitioner's alternative prayer for declaratory relief, apparently believing that its criticisms of the complaint disposed of both aspects of Petitioner's case. The view of the law taken by the Court of Appeals was presumably that, if plaintiff cannot show such an actual or threatened interference with his rights as would support an injunction, he cannot obtain declaratory relief.

This view of the law is at variance with the decision of this Court in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, which expressly asserted (300 U. S. at p. 241):

"Where there is a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be ap-

propriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required".

In *Gully* v. *Interstate Natural Gas Co.*, 82 Fed. (2d) 145 at p. 149, (cited with approval in the *Haworth* opinion, 300 U. S. at p. 244), the Fifth Circuit Court of Appeals said:

> "When, then an actual controversy exists, of which, if coercive relief could be granted and in it the federal courts would have jurisdiction, they may take jurisdiction under this statute of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached [citing authority] * * * Under it disputants as to whose rights there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and without having to make the showing of irreparable injury and the law's inadequacy required for the granting of ordinary preventive relief in equity."

The present case fully meets the tests laid down in the *Haworth* opinion:

> "There is here a dispute between parties who face each other in adversary proceedings. The dispute relates to legal rights and obligations. * * * The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. * * * Such a dispute is manifestly susceptible of judicial determination."
>
> 300 U. S. at p. 242.

The present case, as stated in the complaint and as explained by the affidavits, possesses all the required elements:

first: The parties face each other in adversary proceedings. No collusion exists between Petitioner and Respondents to secure a mutually desired ruling.

second: The dispute relates (1) to the legal right of the National War Labor Board to pass on the immediate labor problem; (2) to the legal right of the Board to proceed as it has proceeded; (3) to the legal right of the Board to provide by order the terms which it has provided; (4) to the legal right of the Board and others to enforce compliance; (5) to the legal right of Respondent Vinson to impose sanctions under executive Order 9370; and (6) to the legal obligation on the part of Petitioner to observe the terms and conditions prescribed by the Board's order. The dispute thus deals with specific legal rights and obligations.

third: The dispute is definite and concrete; it rises out of and relates to a single order of the National War Labor Board. It is not hypothetical, since the order out of which the dispute arises has already been issued. It is not abstract, since it is limited to the rights and obligations arising out of a specific order under a specific set of facts.

fourth: Prior to this suit, the parties had taken adverse positions with respect to their rights and obligations. The Board, in its opinions, had asserted that obedience to its orders was compulsory, and that it was under no obligation to make its orders conform to the provisions of state laws. The Chairman of the Board had asserted that the Board had interpreted the Act as making its orders enforceable through the seizure of the property of noncomplying employers. Respondent Vinson had accepted the responsibility of enforcing an Executive

> Order which had been interpreted by his superior officer, the President, as directing him to impose economic sanctions on non-complying employers. The Petitioner, on the other hand, had asserted that the provisions of the Board's order "do not govern the relations of the parties" (R. 14) and that respondent Vinson "is without legal authority" under Executive Order 9370.

These antagonistic assertions of legal rights and obligations framed a controversy which called for a judicial decision.

The holding of the Court of Appeals that orders of the War Labor Board are not "enforceable" and do not "create legal rights", that the power of seizure does not arise from non-compliance with Board orders, and that Respondents' actions are merely "advisory", do not prove that the case should be dismissed, but instead support Petitioner's case. If the Court of Appeals correctly stated the law, Petitioner was entitled to a judgment declaring the Board's order to be of no force or effect.

So far as Respondent Vinson is concerned, the point made by the Court of Appeals that Executive Order 9370 "neither requires nor authorizes" sanctions "except such as he may deem necessary", does not, if correct, avoid the fact that the complaint called into question Vinson's right to impose sanctions even if he deems them "necessary". On this point at least, Petitioner was entitled to a decision.

The motion for summary judgment of course does not lie as against Petitioner's case for declaratory relief, since nothing in the Respondents' affidavits denied the

making of prior assertions of legal right. The legal conclusion in the Garrison affidavit that the Board "has no power to enforce such directive order", even if good in form, did not deny that the Respondents had claimed that Board orders are enforceable by other agencies of the Government, or that Board orders establish legal obligations to which obedience is legally compulsory.

Respectfully submitted,

HENRY F. BUTLER,
STUART S. BALL,
JOHN A. BARR,
Counsel for Petitioner.

APPENDIX.

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§1503. **Power of President to take possession of plants; amendment of section 309 of this Appendix.**

Section 9 of the Selective Training and Service Act of 1940 (section 309 of this Appendix) is hereby amended by adding at the end thereof the following new paragraph:

"The power of the President under the foregoing provisions of this section to take immediate possession of any plant upon a failure to comply with any such provisions, and the authority granted by this section for the use and operation by the United States or in its interests of any plant of which possession is so taken, shall also apply as hereinafter provided to any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith. Such power and authority may be exercised by the President through such department or agency of the Government as he may designate, and may be exercised with respect to any such plant, mine, or facility whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort: *Provided,* That when-

ever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, lock-out, threatened strike, threatened lock-out, work stoppage, or other cause, such plant, or facility shall be returned to the owners thereof as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof prevailing prior to the taking of possession thereof: *Provided further,* That possession of any plant, mine, or facility shall not be taken under authority of this section after the termination of hostilities in the present war, as proclaimed by the President, or after the termination of the War Labor Disputes Act (sections 1501-1511 of this Appendix); and the authority to operate any such plant, mine, or facility under the provisions of this section shall terminate at the end of six months after the termination of such hostilities as so proclaimed." June 25, 1943, c. 144, § 3, 57 Stat. 164.

§1507. Functions and duties of the National War Labor Board.

(a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017 (set out following this section), dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942 (section 901 (a) of this Appendix), and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes" (sections 901, 961-971 of this Appendix and Title 15, § 713a—8 and note), and by any other statute, shall have the following powers and duties:

(1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon

both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended (Title 29, §§ 201-219); the National Labor Relations Act (Title 29, §§ 151-166); the Emergency Price Control Act of 1942, as amended (sections 901-946 of this Appendix); and the Act of October 2, 1942, as amended (sections 901, 961-971 of this Appendix, and Title 15, § 713a—8 and note), and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

(3) To require the attendance of witnesses and the production of such papers, documents, and records as may be material to its investigation of facts in any labor dispute, and to issue subpenas requiring such attendance or production.

(4) To apply to any Federal district court for an order requiring any person within its jurisdiction to obey a subpena issued by the Board; and jurisdiction is hereby conferred on any such court to issue such an order.

(b) The Board, by its Chairman, shall have power to issue subpenas requiring the attendance and testimony of

witnesses, and the production of any books, papers, records, or other documents, material to any inquiry or hearing before the Board or any designated member or agent thereof. Such subpenas shall be enforceable in the same manner, and subject to the same penalties, as subpenas issued by the President under title III of the Second War Powers Act, approved March 27, 1942 (section 633 of this Appendix).

(c) No member of the Board shall be permitted to participate in any decision in which such member has a direct interest as an officer, employee, or representative of either party to the dispute.

(d) Subsections (a) (1) and (2) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(e) The Board shall not have any powers under this section with respect to any matter within the purview of the Railway Labor Act, as amended. (Title 45, §§ 151-188). June 25, 1943, c. 144, § 7, 57 Stat. 166.

INDEX

CITATIONS

614643—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 538

MONTGOMERY WARD & CO., INCORPORATED,
PETITIONER

v.

NATIONAL WAR LABOR BOARD ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 135–139) has not yet been reported.

JURISDICTION

The order of the District Court was entered on March 20, 1944 (R. 89–90).[1] The judgment of the

[1] After rehearing (R. 100–122), the District Court on June 21, 1944, affirmed its order of March 20, 1944 (R. 122–123).

Court of Appeals was entered on July 19, 1944 (R. 140). The petition for a writ of certiorari was filed on October 2, 1944. The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether a "directive order" of the National War Labor Board, issued subsequent to the War Labor Disputes Act and Executive Order 9370, may, in the circumstances of the present case, be enjoined or declared invalid in a proceeding brought in the federal courts.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the statute and regulations involved are set forth in Appendix, pp. 17–21.

STATEMENT

On October 5, 1943, the petitioner filed a complaint (R. 1–81), and on June 15, 1944, a supplemental complaint (R. 97–98), in the District Court of the United States for the District of Columbia, seeking (1) to enjoin the respondents from enforcing or compelling compliance by the petitioner with a "directive order" of the National War Labor Board issued on August 20, 1943, and (2) a declaratory judgment that such order is illegal and void (R. 17–18, 98). The complaint named as defendants the Board and, in their individual and

official capacities, its members, and the Director of Economic Stabilization (R. 2–3). Similar injunctive relief against "all other departments and agencies of the United States Government, whether named as defendants herein or not" (R. 18), was also prayed for.

The material allegations of the complaint may be summarized as follows: The petitioner is a corporation engaged in selling merchandise at retail through mail-order houses and retail stores (R. 3). At various times, all prior to December 14, 1942, labor disputes between the petitioner and its employees arose in the former's stores at Denver, Detroit, and Jamaica, N. Y. (R. 4–5).[2] No agreement was reached between the petitioner and the certified representatives of its employees (R. 4–5). Efforts of the Conciliation Service of the United States Department of Labor to settle the disputes were unsuccessful, and on December 7, 1942, the disputes were accordingly certified to the National War Labor Board (R. 49), pursuant to Executive Order No. 9017, under which the Board was established (see Appendix, pp. 18–20).[3] A hearing was held on January 14 and 15, 1943, before a panel designated by the Board to hear the disputes (R. 5), and on February 9, 1943, the

[2] It may be noted that the widely-publicized taking of possession by the Government of the petitioner's facilities in Chicago, Illinois, was in connection with orders of the Board not involved here in any respect.

[3] These facts are recited in Exhibit C annexed to the complaint (R. 49), and are not controverted.

panel made its report and recommendations to the Board (R. 6, 48–61), which, after the filing of objections by the petitioner (R. 6–7, 61–66), issued its order of August 20, 1943 (R. 7, 67–70). The order specified that certain provisions relating to "union security", seniority, and arbitration should be incorporated by the parties in a collective bargaining agreement (R. 67–69).

The complaint charged that the Board issued its order without a public hearing; that the order is not supported by substantial evidence or basic findings of fact; that it violates the War Labor Disputes Act; that it is "unfair and inequitable", "arbitrary and capricious", and "the result of bias and prejudice"; and that the petitioner was thereby deprived of liberty and property without due process of law (R. 7–13). It was further alleged that the petitioner has refused to obey the order, and that "the Board has reported, or is about to report and unless restrained by this Court, will report, such non-compliance to the Economic Stabilization Director"; that the "Director, under the terms of Executive Order No. 9370, is required to, is about to, and will, unless restrained by this Court, issue one or more of the directives specified in paragraphs (a) and (c) of said Executive Order, directed against the company" (R. 14); that the petitioner did not know "the exact nature of the directives" which the Director "proposes to and will" issue under that Executive Order "if not restrained", but that "any such

directive * * * would interfere with and destroy the operation of" the petitioner's business "and would result in irreparable injury" (R. 15).

The respondents moved to dismiss the complaint or, in the alternative, for summary judgment, on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (R. 84–85). In support of the motion the respondents filed two affidavits. The affidavit of Lloyd K. Garrison (formerly General Counsel and Executive Director, then an Alternate Public Member of the Board), stated that the Board neither threatened to take nor had taken action to enforce the order; that it had no power to enforce the order; and that it had not referred the matter of the petitioner's noncompliance either to the President or the Director of Economic Stabilization (R. 87). The affidavit of Fred M. Vinson, the Director of Economic Stabilization, stated that the petitioner's noncompliance with the Board's order had not been reported to him; that he neither threatened to take nor had taken action to effectuate compliance therewith; and that he was "not presently advised as to what action, if any, I would take pursuant to my discretion under Executive Order 9370 should the matter ever be reported to me" (R. 86).

The petitioner filed an affidavit that on January 18, 1944, at a hearing held before the Special Committee of the House of Representatives to

Investigate Executive Agencies, Mr. Garrison had stated, in response to a question as to what had "happened to" the petitioner as a result of noncompliance, "It is hard to give a simple answer because the question is colored by the pending litigation. * * * we have been hesitant, while those lawsuits are pending, to attempt to refer the cases to the President, or anything of that sort." (R. 88–89.)

The district court denied the respondents' motion to dismiss or for summary judgment (R. 89–90) and, after rehearing (R. 100–122), affirmed its order (R. 122–123). On appeal to the Court of Appeals (R. 123), the order of the district court was reversed on the ground that the complaint should have been dismissed and summary judgment for the respondents granted (R. 135–140).[4] The court below held that the War Labor Disputes Act does not make the Board's orders enforceable or reviewable; that the complaint does not state "a case

[4] By leave of the court below (R. 134), the petitioner furnished excerpts from testimony given in May 1944 by the Chairman of the Board and the Attorney General before a Select Committee of the House of Representatives (R. 128–134). These excerpts, consisting principally of discussion regarding the general authority of the President to deal with violations of orders of the Board, concern operations and labor disputes other than those here involved. They make no reference to the controversy giving rise to the Board's order here in question. In granting leave to file the excerpts, the court below noted that it had "duly considered them prior to the opinion in this case" (R. 134).

within the court's general equitable jurisdiction to review and restrain administrative action"; and that, in any event, "the uncontradicted affidavits" require summary judgment because they show "that there was no genuine issue as to any material fact" (R. 137–139).

ARGUMENT

While the question presented as to the reviewability of orders of the National War Labor Board is important, we believe the decision below is so clearly correct that further review is not warranted.

1. There is no statute or executive order purporting to authorize judicial review or enforcement of the Board's orders. Indeed, as was held in *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145, 147 (App. D. C.), certiorari denied October 9, 1944 No. 350, this Term, "the legislative history of the War Labor Disputes Act implies a positive intention that these orders should not be reviewed." Congress considered and rejected proposals to make the Board's orders enforceable and reviewable. In the Senate an amendment was offered to the bill, S. 796, to permit enforcement of the Board's decisions through suits by the Attorney General (89 Cong. Rec. 3898). This amendment was not adopted, but the bill, as passed by the Senate, contained a provision making Board decisions subject to court review

"on questions of law" (89 Cong. Rec. 3993–94). This provision was rejected by the House, as was a provision, added by the House Committee on Military Affairs, to authorize the Chairman of the Board to issue interim stay orders, enforceable judicially, for the "maintenance of the status quo." (Section 10, H. Rep. No. 440, 78th Cong., 1st sess.; 89 Cong. Rec. 5382–83.) In a letter to a member of the Conference Committee considering the bill, the Chairman of the War Labor Board opposed the adoption of any such provisions, on the ground that the Board's

> orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the no-strike, no-lock-out agreement and in conformance therewith to carry out the directives of the tribunal created under that agreement by the Commander in Chief.
>
> Since the bill does not, as we understand it, permit the Board to seek enforcement of its orders in the court, the Board's orders are to remain, as we think they should remain, without specific legal sanctions. This being the case, it would seem to us inconsistent to extend to losing parties the the privilege of delaying the outcome by taking the case into court for review.
>
> * * * we respectfully submit that for

> the duration of the war it would be in the best interests of the country to permit the War Labor Board to function as it has in the past 16 months, without the right to apply to the courts for legal sanctions and without being subject to court review of its decisions. (89 Cong. Rec. 5794–95.)

The Conference Committee, on consideration of this letter, omitted from the bill all provision for review or enforcement, and informed the Senate that the bill confers "no jurisdiction whatever" upon the United States district courts "over labor disputes" (89 Cong. Rec. 5754–5), because "the conferees * * * did not care to invite appeals to the courts, and delays" (89 Cong. Rec. 5791). The legislative history of the War Labor Disputes Act clearly shows, therefore, that Congress did not intend to subject the Board's orders to judicial scrutiny. Cf. *Stark* v. *Wickard,* 321 U. S. 288.

2. The crux of the petitioner's argument is that the federal courts may review the Board's order under their general equity powers (Pet. 17–27). We submit, however, that the court below correctly held that the complaint afforded no basis for the exercise of equitable jurisdiction to review the order.

The Board's order neither altered the legal rights of the parties nor imposed legal sanctions of any kind. Failure to comply with its directions did not subject the petitioner to enforcement proceedings or to penalties of any nature.

The present order, unlike that involved in the *Motor Freight Carriers* case, which recently came before this Court upon petition for certiorari, No. 350, this Term, was issued subsequent to Executive Order No. 9370, which authorizes the Director of Economic Stabilization, in cases in which the Board reports noncompliance with its orders, to direct other Government agencies to take "appropriate action relating to withholding or withdrawing from a noncomplying employer any priorities, benefits or privileges extended, or contracts entered into by executive action of the Government." But the respondents' uncontradicted affidavits show that the Board has not reported the petitioner's noncompliance to the President or to the Director of Economic Stabilization, and that the latter has neither taken nor threatened to take any action in this matter, either under Executive Order No. 9370 or otherwise (R. 86–87). As the court below observed (R. 138):

> Allegations that the Board is about to report plaintiff's noncompliance and that the Director is about to issue directives are not statements of fact at all but mere predictions. Little more can be said of the indiscriminate allegation that all the defendants threaten to enforce the Board's order. There are 22 defendants. The complaint does not state the form, substance, time, place, or circumstances of any threat. We must not ignore the prob-

> ability that if the complaint meant to allege threats it would say what form they took and when and to whom they were made. We understand the complaint to mean not that all 22 of the defendants, or any of them, have made threats, but that the plaintiff considers the situation threatening.[5]

Whether the petitioner's noncompliance with the Board's order will ever be referred to either the Director of Economic Stabilization or the President; whether, in such event, the Director would deem it necessary to take any action against the petitioner under Executive Order No. 9370; and whether the President would determine that furtherance of the war effort required that possession of the petitioner's facilities should be taken by the United States, are matters which at present are wholly conjectural. If the Board should report noncompliance to either the President or the Director, such report "would be

[5] The petitioner urges that its "allegations of imminent injurious action" in the complaint were sufficient to set up a ground for injunctive relief (Pet. 18–20), and entitled it "to an opportunity to prove the imminence of injurious action by evidence." This contention is plainly without merit. A mere forecast that "injurious action was intended or reasonably imminent" (Pet. 20) cannot constitute allegation of threatened action sufficiently imminent to support injunctive relief. The court below afforded the petitioner a reasonable opportunity to specify facts (as distinguished from undocumented conclusions) supporting its forecast; and the petitioner failed to supply or to indicate what facts could be proved at a hearing. In these circumstances dismissal of the complaint was clearly proper.

informatory and 'at most, advisory'" and not subject to review by the federal courts. *Employers Group etc.* v. *National War Labor Board,* 143 F. (2d) 145, 151 (App. D. C.); *National War Labor Board* v. *United States Gypsum Co.,* decided October 23, 1944, App. D. C., No. 8695; *Standard Computing Scale Co., Ltd.* v. *Farrell,* 249 U. S. 571, 574. And whether the Director or the President, who is not a party here, would take further action would depend upon independent determinations to be made by them.[6]

In these circumstances, the Board's order "does not of itself adversely affect complainant". Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130. It contains none of the incidents requisite for judicial review in the federal courts. *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145 (App. D. C.); *Baltimore Transit Co.* v. *Flynn,* 50 F. Supp. 382 (D. Md.); cf. *Pennsylvania R. R. Company* v. *Labor Board,* 261 U. S. 72; *Pennsylvania Federation* v. *Pennsyl-*

[6] If the President should order possession to be taken by the United States of the petitioner's stores, such action would be taken to prevent a break-down of services deemed essential in the interest of the war effort. The petitioner's fears of a possible exercise by the President of his seizure powers (R. 17–18, 98) would thus not be removed even if the order were enjoined or declared invalid. Furthermore, Executive Order No. 9370 does not require the Director of Economic Stabilization to act even if noncompliance is reported to him by the Board. He is "authorized and directed in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary" to achieve certain results. Thus this action, also, depends upon the exercise of an independent discretion.

vania R. R. Company, 267 U. S. 203; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299. Cf. *Watson* v. *Buck*, 313 U. S. 387, 399–400; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 237–238; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89.[7]

3. Even if the allegations as to threatened injury were adequate, we suggest that it would have been an abuse of discretion, in the circumstances of this case, to have granted injunctive relief. The Board's order, as an incident in the process of governmental conciliation of labor

[7] The cases cited by the petitioner (Pet. 8) as "probably in conflict" with the decision below do not support its argument. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, arose under the Railway Labor Act of 1926 (44 Stat. 577), and, as the court below found, "Both the legislative history of that Act and a number of expressions in the Act itself which are absent in the War Labor Disputes Act show an intent on the part of Congress to create legal rights" (R. 138). *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, was a suit to enjoin criminal prosecution under the Railway Labor Act for non-compliance with an administrative order. *Stark* v. *Wickard*, 321 U. S. 288, involved the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), which this Court found "bears on its face the intent to submit many questions arising under its administration to judicial review" (321 U. S. at 308), and which was accompanied by Congressional recognition of "the applicability of judicial review in this field" (321 U. S. at 309). *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, not cited by the petitioner, arose under special statutory provisions for judicial review, and involved immediate interference with contractual relationships.

disputes during the war, represented an effort to adjust by administrative action controversies threatening to disrupt functions essential to the prosecution of the war. The issuance of an injunction in these circumstances may have constituted an abuse of equitable discretion, whatever the scope of judicial review. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf. *The Hecht Co.* v. *Bowles*, 321 U. S. 321; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672. The holding of the court below that the district court should have dismissed the complaint is an appropriate acknowledgment of and deference to the national policy manifested in the War Labor Disputes Act not to subject the Board's orders to judicial enforcement or review. Cf. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 305.

4. The court below properly rejected the petitioner's contention that the complaint states a case for a declaratory judgment as to the validity of the Board's order. We have already shown that the petitioner was not entitled to equitable relief. By the same token, the complaint failed to establish any grounds for declaratory relief. There is

here presented no "substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Helco Products Co.* v. *McNutt,* 137 F. (2d) 681 (App. D. C.); *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325; *Smith* v. *American Asiatic Underwriters, Federal,* 127 F. (2d) 754, 756–757 (C. C. A. 9). The Declaratory Judgment Act does not open the federal courts to those who seek "to obtain an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443. See also *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145 (App. D. C.); cf. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293.[8]

[8] In the district court the respondents also argued that the petitioner's suit is against the United States, even though it is not named as a formal party. Cf. *Louisiana* v. *McAdoo,* 234 U. S. 627; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 297. If this is so, the absence of congressional consent to the present suit deprives the courts of jurisdiction over the subject matter. *Oregon* v. *Hitchcock,* 202 U. S. 60, 69; *Minnesota* v. *Hitchcock, supra; Wells* v. *Roper,* 246 U. S. 335, 337; *Louisiana* v. *McAdoo, supra; Transcontinental & Western Air, Inc.* v. *Farley,* 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Appalachian Electric Power Co.* v. *Smith,* 67 F. (2d) 451 (C. C. A. 4), certiorari denied, 291 U. S. 674. This point was specifically reserved in the court below.

CONCLUSION

While the question presented as to the reviewability of the Board's orders is important, we believe further review to be unnecessary in view of the clear correctness of the decision below, as well as the absence of any conflict of authorities. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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OCTOBER 1944.

APPENDIX

I. Statute Involved

The War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. (Supp. III) 1501) provides, in part, as follows:

> Sec. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", and by any other statute, shall have the following powers and duties:
>
> (1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing

both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

II. Regulations Involved

1. Executive Order No. 9017 (January 12, 1942; 7 F. R. 237) reads, in part, as follows:

> Whereas by reason of the state of war declared to exist by joint resolutions of the Congress, approved December 8, 1941 and December 11, 1941, respectively (Public Laws Nos. 328, 331, 332, 77th Congress), the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and
>
> Whereas as a result of a conference of representatives of labor and industry which

met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes:

Now, Therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

1. There is hereby created in the Office for Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special commissioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board.

* * * * *

3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective

prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

2. Executive Order No. 9370 (August 16, 1943; 8 F. R. 11463) reads, in part, as follows:

> By virtue of the authority vested in me by the Constitution and the Statutes of the United States, it is hereby ordered:
>
> In order to effectuate compliance with directive orders of the National War Labor Board in cases in which the Board reports to the Director of Economic Stabilization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary:
>
> (a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a non-complying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until

the National War Labor Board has reported that compliance has been effectuated;

* * * * *

(c) To the War Manpower Commission, in the case of non-complying individuals, directing the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 538

MONTGOMERY WARD & CO., INCORPORATED,
Petitioner,

v.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY TO BRIEF FOR THE RESPONDENTS.

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POINTS COVERED BY THIS REPLY BRIEF.

First: The third point in Respondents' Brief (pp. 13-14) is that:

> "• • • it would have been an abuse of discretion, in the circumstances of this case, to have granted injunctive relief."

This is the first time this argument has been advanced. Since the opinion of the Court of Appeals does not discuss the point, it is of doubtful relevance at this time. In any event, it can be succinctly answered.

Second: Respondents' Brief admits (pp. 7-16) that "the question presented as to the reviewability of the Board orders is important". Respondent's Brief does not contend that the question has heretofore been settled by this Court, but argues against review solely because "of the clear correctness of the decision below, as well as the absence of any conflict of authority".

Petitioner proposes to show that at least three state courts have reached conclusions which are in logical conflict with the basic reasoning of the Court of Appeals. The question should therefore be settled by this Court.

Point One.

Petitioner's Complaint Did Not Ask for Relief Which Would Have Involved an Abuse of Discretion By the Trial Court.

First: The four cases primarily relied on by Respondents do not show that issuance of the injunction asked in the present case would have amounted to an abuse of discretion.

1. *Commonwealth of Pennsylvania* v. *Williams,* 294 U. S. 176, simply held that a federal court should relinquish jurisdiction to a state officer authorized to grant the same relief as the court was asked to grant, since "it reasonably appears that private right will not suffer" (294 U. S. at p. 185).

The result reached was no more than a specific application of the rule that injunctions will not ordinarily be granted except to avoid irreparable injury and in cases where no other adequate remedy less drastic in character is available.

2. *The Hecht Co.* v. *Bowles,* 321 U. S. 321, held that granting of an injunction whenever a violation of the Price Control Act has been discovered is not mandatory on a district court, since the court might make some other order "more appropriate for the evil at hand". The opinion did not attempt to define the circumstances under which the granting of an injunction would have been an abuse of discretion.

3. *City of Harrisonville* v. *Dickey Clay Mfg. Co.,* 289 U. S. 334, held that "complete monetary redress" rather than an injunction should have been given (289 U. S. at p. 339). Here again, the reason for the result was that an injunction will not be granted when adequate money damages can be obtained.

4. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, disapproved of the grant by a trial court of a stay during appeal of an order of the Interstate Commerce Commission which the same court had upheld. Obviously, since the complainant had lost on the merits, it had little or no right to the stay. This holding appears to be entirely irrelevant to the present case.

The most that these four cases hold is that Federal equity courts will forego jurisdiction when other available remedies make it certain that "the private right will not suffer". None of the four announce any principle which would make the granting of an injunction under the circumstances alleged by the plaintiff in the present case an abuse of discretion.

Second: Even if Respondents' proposition were correct as stated it would not apply to Petitioner's request for a declaratory judgment.

The four cases cited all deal with a refusal of the drastic remedy of injunction and in the second and third of them less drastic remedies which established the rights of the parties were specifically approved. Since Petitioner asks not only for an injunction but for the more pacific remedy of a declaration of right, the proposition advanced by the respondents cannot possibly support the dismissal of the complaint in the present case *in toto*.

Third: If orders of the War Labor Board are mere appeals to a "moral obligation", or merely "informatory or at most advisory", as counsel contend and as the Court of Appeals held, the relief sought could not in any way be adverse to the public interest.

Enjoining enforcement of orders which are admittedly unenforceable certainly would not interrupt the proper functioning of the Board, and hence could not be adverse to the public interest. *A fortiori,* a judgment declaring that Board orders have no more force than the Board itself claims for them could not under any conceivable circumstances embarrass the Board in any honest attempt to perform its duties.

Point Two.

Since Respondents Admit That the Question of the Reviewability of Board Orders Is Important and Has Not Yet Been Decided By This Court, the Question Is One Which Should Be Decided By This Court in View of Three State Court Decisions Which Take a Different View As to the Effect of Board Orders.

Respondents contend that review is unnecessary "in view of the clear correctness of the decision below as well

as the absence of any conflict of authorities" (Respondents' Brief, p. 16).

Presumably what Respondents mean is that the question of substance presented, which relates to the construction of a statute of the United States and which has not been decided by this Court, need not, under Rule 38(5)(c) of this Court, be decided because the interpretation of the Court of Appeals is clearly correct and will doubtless be universally accepted.

This argument is completely answered by the fact that at least three state courts have interpreted the powers of the Board in a manner diametrically opposed in logic to the interpretation upon which the decision of the Court of Appeals is based.

The Court of Appeals based its interpretation of the War Labor Disputes Act upon that phase of the legislative history which showed that Respondent Davis wrote to the Congressional conference committee asserting that "no legal change in the status of Board orders is necessary", that such orders were "in reality mere declarations of the equities of each industrial dispute", and that the appeal of the Board was "to the moral obligation of employers and workers to abide by the no-strike, no-lockout agreement" (*Employers' Group of Motor Freight Carriers. Inc.* v. *N. W. L. B.*, 143 Fed. (2d) 145 at p. 149). Hence the Court of Appeals held that "Any action of the Board would be informatory and at most advisory" (*Employers' Group of Motor Freight Carriers, Inc.*, v. *N. W. L. B.*, 143 Fed. (2d) at p. 151), that the War Labor Disputes Act does not "show an intent on the part of Congress to create legal rights" (decision below, *N. W. L. B.* v. *Montgomery Ward & Co.*, 144 Fed. (2d) 528 at p. 530, footnote 6), and that Board orders are not "enforceable" (decision below, 144 Fed. (2d) at p. 530).

Respondents accurately repeat the views which they successfully urged upon the Court of Appeals when they say:

> "The Board's order neither altered the legal rights of the parties nor imposed legal sanctions of any kind".
>
> (Respondent's Brief, p. 9).

The decision of the Court of Appeals was unquestionably based upon the conclusion that Board orders do not fix or alter legal rights.

At least three state courts have decided, to the contrary, that Board orders do have legal consequences.

Since this Petition was filed, the Supreme Court of the State of Wisconsin on October 10, 1944, decided the case of *International Brotherhood of Paper Makers, Local No. 66, A. F. L., et al.* v. *Wisconsin Employment Relations Board, et al., No. 27,* reported in Volume 15 of the Labor Relations Reporter, pages 224-225. The Wisconsin Court had before it an order of the Wisconsin Employment Relations Board requiring an employer to cease and desist from enforcing a union shop provision in a collective bargaining contract. The Court said:

> "Upon the hearing there was brought to the attention of the court by stipulation of the parties, the fact that after the entry of the judgment modifying and confirming the order of the Wisconsin Board, the National War Labor Board had entered an order directing the Rhinelander Paper Company to include in its contract with the union, the closed-shop clause which the Wisconsin Employment Relations Board order required it to delete. This order of the National War Labor Board so far as it appears from the record has never been reviewed and is still in full force and effect. This order having been issued in the exercise of the war powers of the Executive

in time of war supplants and operates to suspend state action in regard to the same subject matter. It would appear therefore that reinstatement of the discharged employee at this time would be in conflict with the order of the National War Labor Board.

"It is ordered that the above entitled matter remain in suspension in this court for the duration of the war or until such time as the order of the National War Labor Board ceases to be effective."

In *Pearson Candy Co., Ltd.* v. *Waits, individually and as representative of Bakery and Confectionery Workers International Union of America, Local No. 417*, the California Superior Court on December 17, 1943, in an opinion reported in Volume 13 of the Labor Relations Reporter 558, at pages 558-559, said:

"Section 7 of the War Labor Disputes Act undoubtedly grants the powers above exercised to the National War Labor Board, together with power to enforce its decisions and directives by means of sanctions or other recognized methods. * * *

"There can be no doubt that in passing the War Labor Disputes Act Congress intended to give to the War Labor Board full power to decide any dispute between employer and employees in any labor disputes which in the opinion of the Board has become so serious that it may lead to substantial interference with the war effort. And furthermore this power stems directly from the war powers of the United States Government as exercised by the President.* * *

"From all of which it appears that, for the duration at least, state courts are deprived of power to adjudicate the validity of labor contracts affecting interstate commerce, and giving rise to a labor dispute which the War Labor Board deems so serious as to lead to substantial interference with the war effort, and over which it assumes jurisdiction. Both the complaint of the plaintiff and the cross-complaint of defendant union should therefore be ordered dismissed."

On September 19, 1944, the Illinois Appellate Court for the Second District issued its opinion in *Frank Foundries Corp.* v. *Creager*, (Ill. App., 2d Dist.), reported subsequent to the filing of this Petition, in Vol. 15 Labor Relations Reporter, at p. 187, saying:

> "By vesting the [War Labor] Board with jurisdiction of labor disputes which may lead to substantial interference with the war effort, the War Labor Disputes Act is analogous to the peacetime Federal Employers' Liability Act, which, it is held, exclusively occupies the field in cases involving injuries to employees engaged in interstate commerce, or in duties connected with or in furtherance thereof, and supersedes the Workmen's Compensation Act of this State.
> * * *
> "Considering appellant's statement that it employes, under average conditions, about 200 men, subject to collective bargaining, and the well known necessary requirement for and the practically universal employment of all iron and steel industries in the war effort, the fact that a labor dispute and a strike in appellant's plant would substantially interfere with the war effort, needs no further exposition. We think there can be no doubt that to such disputes the Federal War Labor Disputes Act supersedes all statutory enactments of this State on the subject, general and special."

The holding in these three cases is in necessary logical conflict with the holding of the Court of Appeals of the District of Columbia in the present case.

If Board orders are merely advice, they cannot license violations of state laws.

If Board orders do not alter the legal rights of the parties, they do not give an employer the legal right to do what otherwise would constitute a violation of state law.

If Board orders do not create the right to do what state law forbids, Board orders do not "supplant or suspend" state law.

If Board orders do not supplant or suspend state law, state courts are not deprived of the power to adjudicate the validity of labor contracts under state law.

If the War Labor Disputes Act does not empower the Board to issue legally binding orders, it does not "supersede all statutory enactments of the state" applicable to labor disputes affecting the war effort.

The Respondents themselves have added to the confusion upon this point by issuing an opinion on October 26, 1944, again subsequent to the filing of this Petition, in *Cudahy Brothers Company and Packinghouse Workers Organizing Committee, Local 40 (CIO)*, Case No. 111-1494-D, reported in Volume 15, Labor Relations Reporter, p. 237, saying:

> "The General Counsel of the National War Labor Board in his opinion on the validity of the position taken by the Cudahy Brothers Company holds that even if the Wisconsin Employment Peace Act did forbid the inclusion in the union contract of a provision for union maintenance of membership, this Board would still have authority to direct such provision of settlement of a labor dispute in an establishment as important to the war effort as is the plant of this company. This position rests upon the fact that the nation is now at war and the winning of the war in the shortest possible time is our present greatest objective. There is much support, including many Supreme Court decisions, for the view that where state laws conflict with authority lawfully exercised in time of war under the war powers which the Constitution confers upon the National Government, the state laws cannot be applied to impede the war effort."

The time has come for this Court to resolve these conflicting and confusing interpretations of the War Labor Disputes Act, and to decide whether Board orders do or do not have legal consequences.

Respectfully submitted,

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